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November 2021

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DOJ Settlement a Reminder That Antitrust Deal Risk Extends Beyond the Deal

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A DOJ Antitrust Division settlement filed last week with merging parties serves as the latest reminder that antitrust risk to companies involved in a deal investigation extends beyond the deal itself.

S&P Global Inc. announced the proposed $44 billion acquisition of IHS Markit in November 2020 and in January filed notifications under the Hart-Scott-Rodino Act for deals exceeding applicable thresholds. After the parties pulled and refiled their HSR in February, DOJ issued Second Requests to them in March. In a settlement filed last week, S&P agreed to divest three price-reporting segments—oil price information services; coal, metals, and mining; and PetrochemWire—to close the deal.

The DOJ-proposed final judgment also requires IHS to waive a non-compete provision between its Oil Price Information Service (OPIS) division and data supplier GasBuddy LLC. According to the complaint filed in federal district court, OPIS entered into a 20-year exclusive data license and non-compete agreement with a former subsidiary, GasBuddy, which operates a crowd-sourced retail gas price information app and provides OPIS with pricing data for resale to commercial gas station customers. The complaint alleges that the non-compete prevented and continues to prevent GasBuddy from launching a data service to compete with OPIS in violation of the Sherman Act, Section One.

The inclusion in the complaint of this allegation, which does not relate directly to the merger itself, is significant. Plaintiffs' attorneys scour such DOJ enforcement actions, as well as those from the Federal Trade Commission, to find fodder for class actions.

DOJ and FTC investigations that reach the Second Request phase, in which merging parties receive hefty subpoenas, implicate large productions of documents, data, and narrative responses—all produced to the federal government. Recent history demonstrates significant risk to companies and even management from the scrutiny of the Second Request process.

In 2016, Westinghouse Air Brake Technologies Corp. ("Wabtec") agreed to divest Faiveley Transport S.A.'s U.S. freight car brakes business to close a $1.8 billion deal. In 2018, DOJ sued Wabtec and Knorr-Bremse AG for alleged illegal "no-poach" agreements among them—commitments not to solicit or hire each other's employees. Suits on behalf of putative classes of rail employees followed soon thereafter, eventually settling in 2020 with Wabtec for $37 million and Knorr for $12 million, respectively. More recently, no-poach agreements have been prosecuted criminally where not reasonably necessary to a larger pro-competitive venture.[1]

In 2014, canned tuna companies Bumble Bee Foods and Chicken of the Sea proposed to merge in a $1.5 billion deal. When DOJ Antitrust messaged its opposition to the combination of the second and third largest players, the deal collapsed.[2] But the companies' greatest antitrust obstacles were still to come. DOJ uncovered an industry-wide price-fixing scheme among Bumble Bee, Chicken of the Sea, and StarKist, and indicted four executives, including the President and CEO of Bumble Bee. The companies paid tens of millions of dollars in fines, and faced numerous follow-on class actions, which are still being litigated.

It is understandable that in-house counsel can be surprised by such developments. In-house counsel rarely, if ever, get the visibility into their own company that antitrust regulators get during a Second Request process. Regulators also access the counterparty's documents and voluminous pricing and sales data, which are analyzed by economists, and submissions from third-party players in the industry.

How then is a company to manage the risk, that somewhere among the documents and data swept into a massive Second Request investigation there may be a separate antitrust problem lurking? Companies should:

1. Meet and exceed DOJ's 2019 compliance policy.
2. Conduct regular antitrust training and periodic audits.
3. When a strategic transaction is on the horizon, consider a proactive assessment of internal risk.

As the outcomes from the deals above suggest, once the DOJ investigation into the transaction begins, it is often too late for a company to discover internal risk. The purchase agreement may obligate the parties to comply with a Second Request. If the deal counterparty is also a cartel member, they may win the race to report under the DOJ Antitrust Division Leniency Program.

Where a deal starts to materialize and antitrust diligence suggests a likelihood of a Second Request, self-assessment to consider antitrust risk beyond the deal may be warranted. The resources needed to complete an assessment pale in comparison to the tens of millions of dollars in fines or exposure from follow-on class actions, as well as potential criminal liability for individuals, should the regulator find the evidence first.

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[1] https://www.justice.gov/atr/case-document/file/1373776/download

[2] https://www.justice.gov/opa/pr/chicken-sea-and-bumble-bee-abandon-tuna-merger-after-justice-department-expresses-serious